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Supreme Court, U.S.
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No. 02-628

IN THE

Supreme Court of the United States

LINDA FREW, on behalf of her daughter, Carla Frew, et al.,

Petitioners,

v.

DON GILBERT, Commissioner of the Texas Health and Human Services Commission, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AARP, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE AMERICAN CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION LEAGUE, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, CHILDREN'S RIGHTS, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, THE NATIONAL HEALTH LAW PROGRAM, AND NOW LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Statement of Interest*

Amici curiae are national membership organizations and civil rights advocates, who share an interest in assuring that obligations imposed under the Constitution and federal health, welfare, and civil rights statutes – many of which have been enacted for the benefit and protection of the most vulnerable Americans – are fulfilled.

Amici and their local affiliates have participated, as both counsel and party, in scores of suits that, like this one, sought government officials' compliance with federal law and were resolved consensually, with a federal court's entry of a consent decree. These cases involve matters as varied as prevention of sexual abuse of patients in State institutions for the mentally ill, *Caroline C. v. Johnson* (D. Neb. 1998); appropriate foster care for abandoned and neglected children, *Juan F. v. Rowland* (D. Conn. 1991); medical services for children with severe physical and developmental disabilities, *Chisholm v. Hood* (E.D. La. 1998); and desegregation of public housing, *Thompson v. H.U.D.* (D. Md. 1996). Many of these decrees are still in force – though, consistently with governing equitable principles, a substantial number have been modified, and others, vacated.

This long and diverse experience with consent decrees – and even more extensive experience in litigation where consensual resolution proved unattainable – confirms what this Court's cases have consistently taught: that important public interests are served when parties are able to reach – and courts empowered to enforce – negotiated settlements. Our experience convinces us that, in addition to the substantial judicial and litigation resources conserved, when adversarial proceedings are avoided official defendants are more likely to achieve good-

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*This brief was not authored in any part by counsel for a party, and no one other than *Amici* made a monetary contribution to its preparation or submission. Both parties have consented to its submission.

faith compliance with federal law, more quickly.

As we explain below, the appeals court decision in this case is untenable as a matter of legal principle. The rules imposed by the Fifth Circuit concerning the legal effect of consent decrees and federal courts' power to compel compliance with them are irreconcilable with numerous decisions of this Court.

But this is also a case where settled law draws strong reenforcement from fundamental policy concerns, and in submitting this Brief, we seek to alert the Court to the important practical reasons for repudiating the decision below. Not only does the Fifth Circuit rule place federal courts in the constitutionally intolerable position of entering decrees that they may not enforce if disobeyed, but, if sustained, it would operate highly unfairly in cases (including *Amici*'s) where consent decrees are now in place, permitting defendants to violate bargained-for, ostensibly binding obligations, without any showing that their operation has become inequitable.

At least equally troubling, we believe, would be the systemic consequences of endorsing the approach taken below. By effectively denying consent decrees with State officials *any* independent, binding force, the Fifth Circuit's rules would make negotiated settlement a practical impossibility in a broad array of cases – a prospect that would be no more welcome by these officials than it is by *Amici* and others who sue them in federal court.

Statement of The Case

This suit was filed in 1993 to compel defendants, Texas officials, to fulfil their obligation to provide indigent children with Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services, as required by the Medicaid Act. *See* 42 U.S.C. §§1396a(a)(43)(A); (B); (C); 1396d(r). The complaint described a large-scale failure to provide children with

medical, dental, vision and hearing screens; with necessary corrective treatment; and with information about the EPSDT Program.[1]

In 1994, after extensive discovery and after the district court had certified the case as a class action, the parties undertook settlement negotiations. In late 1995, they reached an agreement settling most of the claims raised in the complaint and submitted it to the district court, jointly requesting that it be adopted as the court's decree. *See Frew v. Gilbert*, 109 F. Supp. 2d 579, 588 (E.D. Tex. 2000).[2] After conducting an evidentiary hearing, the district court adjudged the negotiated resolution "fair, reasonable, and adequate," *see* Fed. R. Civ. P.

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[1]As its title suggests, the central thrust of the statutory program is promotion of children's health through prevention, early detection and treatment. It is widely accepted that such an approach is a highly effective use of resources, *see* COMMITTEE ON ECONOMIC DEVELOPMENT, CHILDREN IN NEED (1989), and, as President Johnson emphasized in introducing the program, for children, the difference between early and late diagnosis can be the difference between full recovery and serious, lifelong health problems. 113 CONG. REC. 2883 (Feb. 8, 1967).

Congress also recognized that, despite the common sense of this preventative approach, (1) it represents a real break from the traditional mode of delivering health care to poorer children, which has relied heavily on *ad hoc* emergency care; (2) that effective prevention depends critically on information and outreach efforts that go beyond what health care providers have customarily undertaken; (3) and that these sort of services do not always fare well in competition with other medical services for State officials' resources and attention. Because Congress wanted to make clear that, these difficulties aside, promotion of children's health is a top federal priority (and to ensure that States, in accepting federal funds, would effectively honor that policy choice), the statutory provisions are written in unusually detailed and stringent terms.

[2]Earlier that year, the parties had presented the district court with an initial agreement – indicating at that time that Respondents' "final approval" would await their having"inform[ed] appropriate legislative and executive offices of the State of the content and potential financial implications of this agreement."

23(e), and – indicating that it was likely that plaintiffs "could have succeeded at trial" Order Entering Decree (Jan. 25, 1996) at 25 – entered the settlement as its order. The defendant officials did not appeal.

The decree is "a lengthy document," 300 F.3d at 353, one in which the officials, without conceding liability,¶301, committed to a "highly detailed and specific [set of] procedures relating to the EPSDT program," 300 F.3d at 535, and undertook to file quarterly reports informing the district court of the'"status of each activity'" required under the decree, ¶¶306-7.

The decree is phrased in terms that are unmistakably mandatory – and that expressly contemplate court enforcement. Thus, paragraph 6 states that "the parties agree [to] *and the Court orders* * * * " implementation of the measures provided for in the decree, *id.* (emphasis added), and another provision confirms that "'will'" – a term used throughout the decree – "creates a mandatory, *enforceable* obligation," ¶302 (emphasis added).

The officials – both in their presentation to the district court and within the decree's four corners – expressly acknowledged that the parties' agreement was "reached within the framework of federal law related to the EPSDT and Medicaid programs." ¶308.

In November 1998, Petitioners filed a motion alleging that the officials were in default on many of the obligations imposed under the consent decree. The district court conducted a five-day evidentiary hearing in March 2000, and in August 2000, issued an opinion finding that decree violations had been established in most of the areas about which Petitioners had

complained.[3] After rejecting defendants' arguments that enforcement of the decree was barred by the Eleventh Amendment, the district court entered an order requiring the officials to submit within 60 days a plan for coming into compliance with their consent decree obligations.

On Respondents' interlocutory appeal, the Fifth Circuit vacated the enforcement order, ruling that the district court had misconceived its power to compel compliance with its decree. The district court's cardinal error, the Fifth Circuit explained, had been in "focusing on the consent decree requirements" rather than "determin[ing] whether an alleged violation of the consent decree would constitute, *in the absence of the decree*, a statutory violation of the Medicaid Act remediable under § 1983." 300 F.3d at 537 (emphasis added).

Without questioning the district court's conclusions that each of the decree provisions defendants were found to be violating met the requirements established in *Firefighters v. City of Cleveland,* 478 U.S. 501, 525 (1986), *i.e.*, that each (1) "served to resolve a dispute within the court's subject matter jurisdiction," (2) "came within the general scope of the case made by the pleadings," and (3) "further[ed] the objectives of the law upon which the complaint was based," the Fifth Circuit

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[3]For example, the district court found that, although eligible children and their families are entitled to information about EPSDT – and the consent decree required officials to inform them effectively – "large numbers of class members" continued to be unaware of their entitlement to State-provided EPSDT services. 109 F. Supp. 2d at 590. The court found numerous violations respecting defendants' obligations to children in managed care: many were not receiving required immunizations and lead-poisoning screens, *see* 109 *id.* at 623-64, and some had been unable to obtain even emergency treatment for severe asthma attacks and dehydration, *id.* at 629. In addition, large numbers of plaintiff class members were receiving no dental care at all, *id.* at 602. *See id.* (noting result that emergency rooms were crowded with children, "suffering from acute forms of dental disease that, while easily preventable, often lead to [serious] health complications").

explained that the *Firefighters* standards govern "the *entry*" of consent decrees – and do not establish a court's jurisdiction "'to issue its own, different order enforcing * * * the decree.'" 300 F.3d at 541 (quoting *Lelsz v. Kavanagh,* 807 F.2d 1243, 1252 (5th Cir.), *reh'g en banc denied,* 815 F.2d 1034, *cert. dismissed,* 483 U.S. 1057 (1987)).

The court further noted that *Firefighters* had involved a decree with a municipal government defendant, rather than State officials entitled to Eleventh Amendment immunity, 300 F.3d at 543 & n.67. The Eleventh Amendment, the decision continued, is "a limitation on the federal courts judicial power," – one that can apply "[r]egardless of what the parties agree[] to in the consent decree," *id.* at 542. After ruling that defendants' litigation conduct did not amount to a waiver of Eleventh Amendment immunity, *id.* at 548-51[4] – and that federal courts' "inherent jurisdiction,"*id.* at 542, is insufficient to overcome an assertion of immunity – the Fifth Circuit reaffirmed that only those provisions that embody actual requirements of the federal Constitution or a federal statute could be subject of an enforcement order. *See id.* (citing *Lelsz* and *Saahir v. Estelle,* 47 F.3d 758 (5th Cir.1995)).

The court then construed Circuit precedent to impose a further limitation. In view of the rule limiting decree enforcement to provisions that "vindicate *federal rights*" – and

[4] The appeals court gave three reasons for declining to infer waiver: (1) that the decree "expressly stated * * * that 'Defendants do not concede liability,'" 300 F.3d at 549 (quoting ¶301); (2) that Respondents had "repeatedly raised in the district court an Eleventh Amendment defense to the enforcement of the decree," *id.*, and (3) that, unlike in *Watson v. Texas,* 261 F.3d 436 (5th Cir. 2001), and *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613 (2002), the officials here were "sued as defendants" and had not "voluntarily chosen to submit * * * to the jurisdiction of the federal court," 300 F.3d at 550. Seeing these as sufficient reason to find no waiver, the court declined to decide the Attorney General's State law authority to consent to the decree. *Id.* at 549.

of case law holding that not every violation of *federal law* is a deprivation of a "right," actionable under 42 U.S.C. § 1983, *see, e.g., Blessing v. Freestone,* 520 U.S. 329 (1997); *Golden State Transit Corp. v. Los Angeles,* 493 U.S. 103 (1989), the Fifth Circuit announced that:

> Before [a] district court can remedy a violation of a provision of [a] consent decree, plaintiffs must demonstrate that any such consent decree violation is also a violation of a *federal right,*" *i.e.*, "by showing (1) a statutory violation of a specific provision of [a federal statute] (2) which was intended to benefit plaintiffs, (3) which is not so vague and amorphous that its enforcement would strain judicial competence, and (4) which imposes a binding obligation on the states.

300 F.3d at 543. Accordingly, the district court's order, which did not reflect this sort of "particularized * * * analysis as to each alleged violation of the consent decree," *id.* at 542, could not stand.[5]

Summary of Argument

This Court's precedents stand emphatically against the proposition that the Eleventh Amendment creates a class of judicial decrees (or decree provisions) that are *valid* as entered, but unenforceable. Whether understood as resting primarily on (1) the rule that "affirmative litigation conduct," *Lapides,* 535 U.S. at 617, will waive an Eleventh Amendment defense or (2)

[5] The appeals court did not reach defendants' arguments that the district court had misinterpreted the consent decree, *see* 300 F.3d at 537. The Fifth Circuit did, however, reject Respondents' argument, grounded on the later-reversed district court decision in *Westside Mothers v. Haveman,* 133 F. Supp. 2d 549 (E.D. Mich. 2001), *rev'd in relevant part,* 289 F.3d 852 (6th Cir.), *cert. denied,* 123 S. Ct. 618 (2002), that there is a "'Spending Clause exception' to the *Ex Parte Young*" doctrine, 300 F.3d at 550. *See id.* ("For purposes of the Supremacy Clause and *Ex Parte Young,* the mandates set out in Medicaid statute are more than contractual; they are federal law").

the "principle that * * * [w]here the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution," *Root v. Woolworth*, 150 U.S. 401, 412 (1893); *see Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906), the rule must be that "[i]f a federal court can validly enter a consent decree, it can surely enforce that decree." *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989).

In addition to its inconsistency with precedent, the Fifth Circuit's contrary rule is an affront to basic rule-of-law norms. Not only does it relegate federal courts to "hoping" that parties ostensibly bound by judgments will comply with them, but officials who are dissatisfied with decrees will have scant reason to use lawful, but more burdensome, procedures for obtaining relief from judgment. *See* Fed. R. Civ. P. 60(b)(5). Indeed, the Fifth Circuit's rule, which holds attacks on final judgment by parties who *have disobeyed them* to *less stringent* standards than objections to the *entry* of the same decree, is at odds with fundamental norms of judicial procedure.

To the extent the decision below is understood to have treated the decree as "invalid," *i.e.*, construing the Eleventh Amendment to impose stringent limitations – beyond the requirements of *Firefighters* – on provisions that may lawfully be *entered* as part of a federal consent decree, it is equally irreconcilable with this Court's teaching. First, there is no question that the dispute resolved was within the court's subject matter jurisdiction, and this Court has settled that when officials consent, federal courts have the power to enter decrees that include obligations that "spring from" or "relate to" federal law – and not just those which merely restate federal law requirements. *See Rufo v. Inmates of Suffolk Co. Jail*, 502 U.S. 367, 378 (1992).

The proposition that § 1983 imposes a further, "jurisdictional" limitation on federal courts' power to enter decrees is even more plainly mistaken. If decrees that go

further than the *federal law* minimum are permissible, *Rufo*, it follows that whether or not a provision falls within the *subset* of federal laws that are "federal rights" under § 1983 does not bear on a court's *power*. *See also Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998).

A rule that prevents federal courts from compelling compliance with consent decree requirements that are *also* obligations of federal law – on the ground that plaintiff would not have a § 1983 *right* in the absence of a decree – surely draws no support from *Ex Parte Young*. That doctrine aims to assure the supremacy of federal *law*, *Green v. Mansour*, 474 U.S. 64 (1985), and the Court has consistently sustained prospective relief against State officials in cases where violations of federal *law* are ongoing – but where plaintiff would likely not have a § 1983 "right." *E.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000); *see also Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992); *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting).

Indeed, settled principles establish that the § 1983 cause-of-action question is not a relevant one when enforcement of a court decree is sought. Defendants surely may waive an objection that a statute does not entitle plaintiffs to particular relief, *see Swift Co. v. United States*, 276 U.S. 311 (1928) ("*Swift I*"). That is what defendants typically do by entering consent decrees, *see id.*; *Suter*, 503 U.S. at 354 n.6. And plaintiffs who seek to compel compliance with an equity court's decree do not need a distinct, congressionally conferred cause of action to do so.

Unfairness to litigants in Petitioners' position and interference with orderly judicial administration are not the only ways in which the rules announced below fail to "make[] sense." *See Lapides*, 535 U.S. at 620. By limiting federal courts, confronting violations of consent decree provisions, to enjoining actions that would be unlawful "in the *absence* of a

decree," 300 F.3d at 537, the decision imposes an essentially prohibitive "disincentive to settle institutional reform litigation," *Rufo*, 502 U.S. at 389. A legal regime under which obligations that defendants stipulate to be "enforceable" may not be enforced – and plaintiffs who make significant concessions in negotiations are no better off than if no decree had been entered – is one that assures, as a practical matter, that cases against State officials will always be litigated to final judgment.

While the decision below may have afforded these Respondents a welcome "litigation advantage[]," *Lapides*, 535 U.S. at 620, its premises, if endorsed, would surely *constrict* the range of options available to State officials facing future federal lawsuits. To the extent that its limitations apply – as the decision said they do – "[r]egardless of what the parties agreed to in the consent decree," 300 F.3d at 542, they deny officials freedom to determine that State interests would be served by agreeing to undertake judicially enforceable obligations – or by not pressing a § 1983 defense. But even if that extreme formulation could be discounted, the practical reality will remain: plaintiffs who otherwise could and *would* negotiate consent decrees on terms the State would find preferable to what litigation would offer will refrain from doing so.

The legal rules imposed in the decision below are surely not necessary to advance any legitimate interests of State government. Officials are "under no compulsion," *see Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring), to agree to settlements; to make them judicially enforceable; or to enter into them before disputed legal or factual issues are determined. In every sense, the consent decree enforcement proceeding was "'the result of [Respondents'] voluntary act.'" *Lapides*, 535 U.S. at 620 (quoting *Gunter*, 200 U.S. at 284).

Finally, existing rules provide a means for defendants to

obtain relief even from voluntarily assumed decree obligations, when intervening events render continued compliance unexpectedly burdensome or otherwise inequitable, *see* Fed. R. Civ. P. 60(b)(5), and under this Court's precedents, such claims from official defendants are considered with special care, *see Rufo*. These substantial protections already in place make the appeals court's rules – and the unfairness and anomaly that they would entail – wholly unwarranted.

ARGUMENT

I. State Officials' Consent To A Federal Court's Decree Waives Eleventh Amendment Objection To Its Enforcement

As Petitioners' Brief explains – and numerous courts have decided, *see, e.g., New York State Ass'n for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 39 (2d Cir. 1979) – defendants' consent to a court order embodying the provisions at issue is precisely the sort of "affirmative litigation conduct," *Lapides*, 535 U.S. at 617, that should preclude an Eleventh Amendment defense in a proceeding that seeks only prospective compliance with those obligations.

In a consent decree case, the relevant "litigation act," 535 U.S. at 620, is extraordinarily clear. Both parties represent to a federal court that they "desire and expect" that their "agreement * * * will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees," *Rufo*, 502 U.S. at 378.

Although the Fifth Circuit stressed that the officials had not "voluntarily invok[ed] the federal court's jurisdiction, but * * * were sued as defendants," Respondents' claim of Eleventh Amendment immunity does not relate to the *initial suit* – which clearly fell within the *Ex Parte Young* jurisdiction – but rather to the court's power to enforce decree provisions, which defendants had labeled "mandatory [and] enforceable" (¶302)

and had asked the court to "*order*" (¶6) (emphasis added). *See Wisconsin Hosp. Ass'n v Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987) (Posner, J.) (when decree "settle[s] a genuine, noncollusive case that was within the exception to the Eleventh Amendment that *Ex parte Young* created" enforcement proceeding does not "engage the Eleventh Amendment").[6]

Even more than in other cases where State officials elect to participate in federal litigation, *Clark v. Bernard*, 108 U.S. 436, 447 (1883), the federal court's *enforcement order* was the direct "result of [Respondents'] own voluntary act." *Lapides*, 535 U.S. at 620 (quoting *Gunter*, 200 U.S. at 284).[7]

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[6]Although the language of the decree in this case – and the conduct of Respondents – surely reinforce the soundness of finding waiver here, it is the nature of a consent judgment, *i.e.*, the parties' "desire and expect[ation]" that it will be enforced by the federal court, *Rufo*, 502 U.S. at 378, that warrants treating it as a waiver of immunity from enforcement. *See Lapides*, 535 U.S. at 623-24 (rules for inferring waiver from conduct should be "clear * * * [and] easily applied by both federal courts and the States themselves").

[7]The Fifth Circuit's other bases for finding no waiver fare no better. It can be of no moment that defendants had made Eleventh Amendment objections before or after decree entry – because the act of seeking entry of the decree was patently "inconsistent" with maintaining that agreed-to provisions are beyond a federal court's power to order. *See Lapides*, 535 U.S. at 619. Nor is the inference that defendants reserved an Eleventh Amendment defense by declining to admit *liability* a plausible one. Leaving aside differences between immunity and liability, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993), such a provision is unexceptional. Indeed, a dictionary definition of "consent decree" is "[a] judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing." BLACK'S LAW DICTIONARY 410 (6th ed.1990). The legal significance of provisions such as ¶301 is the opposite of what the decision below implied: they do not preserve a basis for challenging a decree, but rather indicate defendants' assent to a court's award of relief, *as if* they were liable. *Compare Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir.1991). Finally, the Fifth Circuit's (inconclusive) inquiry into the Attorney General's State law authority is precisely what *Lapides* indicated need not be pursued. *See* 535 U.S. at 622-23.

II. The Eleventh Amendment Provides No Basis For Recognizing A Category Of Federal Court Orders That Are "Valid" – But Not Enforceable

A. The Eleventh Amendment *Does Not* Divest A Federal Court Of "Inherent Jurisdiction" To Enforce Its Orders

But even if the Circuit Court's erroneous resolution of the waiver issue did not compel reversal, this Court's case law refutes the central premise of the decision below: that the Eleventh Amendment limits a federal court's jurisdiction over a proceeding seeking compliance with its decree. *See Gunter*.

"Courts by their creation [are] vested with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates," *Anderson v. Dunn*, 18 U.S. 204, 227 (1821); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) ("That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled").

Consent decrees are "judicial acts" and must be obeyed as such, *Rufo*, 502 U.S. at 378; *United States v. Swift & Co.*, 286 U.S. 106, 116-17 (1932) ("*Swift II*") (consent decree, whether "right or wrong, became the judgment of the court"); *accord United States v. Krilich*, 303 F.3d 784 (7th Cir. 2002) (consent decree, is "a judicial decree that is subject to the rules generally applicable to other judgments and decrees"), *cert denied*, 538 U.S. __ (Apr. 21, 2003); *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986) ("The respect due the federal judgment is not lessened because the judgment was entered by consent").

Indeed, judicial enforceability is what distinguishes consent decrees from other forms of consensual resolution. *See Rufo*, 502 U.S. at 378 (a decree is "an agreement that the parties * *

* expect will be * * * * enforceable as [] a judicial decree"); *Kozlowski*, 871 F.2d at 245 ("The judicial aspect of a consent decree derives from the imprimatur of the court, which invests the decree with the integrity of the judiciary and signifies the court's willingness to implement the solution of the parties"); *see generally Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994) (if a court's order "incorporates the terms of the settlement agreement," a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist"); *cf. Farrar v. Hobby*, 506 U.S. 103, 113 (1992) (plaintiff who obtains consent decree "prevails," for attorney's fee statute purposes, because of "entitle[ment] to enforce [it] * * * against the defendant").

The Fifth Circuit's error was in treating the enforcement stage as a "'different'" proceeding, 300 F.3d at 541 (quoting *Lelsz*) in which the jurisdiction of a federal court, upon finding its decree violated, extended no further than its power to compel official action "*in the absence of a decree*," *id.* at 542 (emphasis added).

But when an action seeks to enforce a "legal duty * * * which is required of [a defendant] * * * by virtue of the judgment [the plaintiff] has already obtained," *Labette County Comm'rs v. United States ex rel. Moulton*, 112 U.S. 217, 221 (1884), the proceeding is *not* "a new suit, in the jurisdictional sense," *Riggs v. Johnson County*, 73 U.S. 166, 198 (1867), but rather "a proceeding ancillary to the judgment which g[ave] the jurisdiction," *id.*; *accord Kokkonen*, 511 U.S. at 378 (contrasting a proceeding that "is more than just a continuation or renewal of the earlier proceeding," which would "require[] its own basis for jurisdiction"); *Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937) (a federal court's "jurisdiction to entertain" a bill "to effectuate its prior decree * * * follows that of the original suit").

These jurisdictional principles apply fully where State

officials are the parties bound by the decree. Thus, in *Gunter*, the Court expressly held that the Eleventh Amendment does not prevent "a court of the United States [from] administering relief * * * in a matter ancillary to a decree rendered in a cause over which it had jurisdiction," 200 U.S. at 292. Sustaining a federal court order prohibiting South Carolina officials from undertaking to collect a tax previously enjoined as unconstitutional, *Gunter* explained that "the right of the court to administer relief – to make its decree effective" is not "to be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain." 200 U.S. at 292; *see also Prout v. Starr*, 188 U.S. 537 (1903); *Woolworth*, 150 U.S. at 412 ("the bill, being ancillary to the original proceeding * * * can be maintained without reference to the citizenship or residence of the parties").[8]

This principle was reaffirmed in *Hutto v. Finney*, 437 U.S. 678 (1979), which sustained against Eleventh Amendment challenge an order requiring officials to pay State funds to the prisoner-plaintiffs, as a financial penalty for defendants' bad-faith failure to comply with a district court order. "Under *Ex parte Young* and *Edelman v. Jordan*," *Hutto* explained, "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." 437 U.S. at 691. *See Reivitz*, 820 F.2d at 868

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[8]Absence of diverse citizenship, as in *Woolworth*, is a defect of federal subject matter jurisdiction – which, ordinarily, cannot be waived. *Compare Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 267 (1997) ("The [Eleventh] Amendment * * * enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"); *United States v. Cook County*, 167 F.3d 381, 388-89 (7th Cir. 1999) ("For most purposes it overstates the strength of sovereign immunity to analogize it to a lack of jurisdiction. Any difference between the two should make it easier to raise a jurisdictional objection belatedly than to raise a sovereign-immunity objection belatedly").

("Against a state that violates a valid federal court decree the court has the power to issue any order necessary to enforce the decree, including an order to pay").

While the outer limits of federal court enforcement jurisdiction may be "[im]precise," *Kokkonen*, 511 U.S. at 379, the order here, one "merely requir[ing] compliance with the existing judgment by the persons with authority to comply," *Peacock v. Thomas*, 516 U.S. 349, 358 (1996), arises from its undisputed core.[9] Indeed, the order, which only directs defendants to *propose a plan* of prospective compliance with existing decree provisions, raises far less substantial Eleventh Amendment concerns than did the decrees in *Hutto* or *Reivitz*. There is no conceivable danger here of a "large or * * * unexpected" monetary penalty, *Hutto*, 437 U.S. at 692 n.18, and there can be no contention that the relief ordered goes further than "necessary to enforce the court's prior orders," *id.*; *cf. Spallone v. United States*, 493 U.S. 265 (1989).[10]

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[9]Recent decisions rejecting novel theories of "ancillary jurisdiction" cast no doubt on *Gunter* or other precedents. On the contrary, those cases: concerned actions of federal courts which were conceded to have no other basis for subject matter jurisdiction, *see Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366 (2002); *Kokkonen*; involved assertions of different remedies, *see Peacock*, against different parties, *see id.*, whose relation to the underlying judgment was tangential; and were not necessary to preserving the federal court's authority, *see* 516 U.S. at 360.

[10]Indeed, while the Fifth Circuit treated federal courts' "inherent power" to enforce lawful decrees as entirely different from (and lesser than) the power recognized in *Ex Parte Young*, that understanding is itself problematic. Under the Constitution, valid federal court decrees are themselves Supreme law. *See Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 696 (1979); *see Badgley*, 800 F.2d at 38 ("When the defendants chose to consent to a judgment, * * * the result was a fully enforceable federal judgment that overrides any conflicting state law or state court order"); *see also Komyatti v. Bayh*, 96 F.3d 955, 960 (7th Cir. 1996) ("[A] provision in a validly-entered consent decree is an obligation on State officials to conform their conduct to federal law").

B. The Fifth Circuit Rule Is Anomalous And Unfair

The proposition that a federal decree may be validly entered, but not be enforced, cuts against the grain of basic rule-of-law norms. *See Komyatti*, 96 F.3d at 962-3 (allowing officials to violate decrees is not "compatible with the traditions of our people and their commitment to a rule of law"). A doctrine that permitted (or required) district courts to enter agreements as ostensibly binding orders, but denied them power to compel compliance undermines the integrity of the judicial process. *Vecchione, v Wohlgemuth*, 558 F.2d 150, 158-9 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (if sovereign immunity could be raised after entry of judgment, the judgment would be a "mere advisory opinion"); *Cook County*, 167 F.3d at 386 (rule precluding federal government from raising sovereign immunity as a basis for a collateral attack "is essential if judgments are to resolve the parties' disputes, rather than just set the stage for the next act"); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff").[11]

Indeed, the Court has often stressed that even when a judicial decree is "subject to substantial constitutional question," disobedience is not an option. *Washington Fishing Vessel Assn.*, 443 U.S. at 696 (even where court orders are "erroneous in some respects, all parties have an unequivocal obligation to obey them while they remain in effect"); *see also*

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[11]As Judge Easterbrook explained in *Cook County*, allowing the United States to raise sovereign immunity in an attack on a judgment "would reduce to advisory status all decisions adverse to the financial interests of the United States,"167 F.3d at 386. *See id.* (describing such a regime as "unpalatable [and] likely * * * unconstitutional"). The conduct here goes considerably beyond litigating a case to final judgment, *see Cook County*: Respondent officials expressly requested that the court to "*order*" them to perform the obligations they now resist on immunity grounds.

Cooper v. Aaron, 358 U.S. 1, 18-19 (1958); *Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("The orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings"); *Walker v. Birmingham*, 388 U.S. 307, 317 (1967).

As a practical matter, according officials who do not comply with decrees broad rights to object to the decrees in enforcement proceedings leaves them scant incentive to pursue lawful, but more cumbersome, means for obtaining relief from judgment. *See Rufo*, 502 U.S. at 383, 391 (imposing on party seeking Rule 60(b)(5) modification burden of (a) showing "a significant change in circumstances" and (b) proposing appropriately tailored modification); *Hook v Arizona Dep't of Corrections*, 972 F.2d 1012, 1017 (9th Cir. 1992) (rule forbidding State officials from raising Eleventh Amendment defense in enforcement proceeding "is supported by policies favoring the finality and binding effect of judgments and requiring the party seeking relief from a final judgment to bear the burden of modifying it").[12]

A rule that imposes stricter standards for a decree's enforcement than its entry suffers from two further defects. First, it operates with maximal unfairness to litigants, such as Petitioners, who, in exchange for defendants' undertaking limited, but judicially enforceable, obligations, forego other potentially meritorious claims. Even worse than a ruling declining to *enter* a decree at the inception – which leaves plaintiffs essentially in the position they occupied before pursuing settlement – a rule that makes decree provisions

[12]Although, in discussing its appellate jurisdiction, the decision below treated the district court's order as one "'refusing to dissolve or modify' an injunction," 300 F.3d at 537 (quoting 28 U.S.C.§1292(a)(1)), Respondents *did not* move to vacate or modify this decree.

unenforceable "allow[s] the [defendant official] to avoid * * * bargained-for obligations – while retaining the benefits of concessions he obtained on other issues during the negotiations." *Kozlowski,* 871 F.2d at 245.

Finally, the Fifth Circuit rule reverses what is an almost universal rule of judicial administration: that claims of error, if entertained at all, must meet increasingly stringent standards at successively later stages of the judicial process. Although not all objections are deemed forfeited by a party's failure to raise them at the earliest possible opportunity, *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *Hormel v. Helvering,* 312 U.S. 552 (1941), the distinction between an assertion of error on appeal and one that comes after final judgment is fundamental. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1019 (7th Cir. 1998) ("only an egregious want of jurisdiction will allow the judgment to be undone by someone who, having participated in the case, cannot complain that his rights were infringed without his knowledge").[13]

These principles apply with special force to consent decrees. Thus, *Swift I*, after contrasting English practice, under which "a consent decree could not be set aside by appeal * * * except in case of clerical error" with the more "liberal" American rule, where "lack of actual consent * * * fraud in its procurement," or lack of federal jurisdiction – but not "the merits of the cause" – "would also be considered," 276 U.S. at 323-24, indicated that where "the attack is not by appeal * * * but by a motion to vacate, filed more than four years after the entry of the decree, the scope of the inquiry may be even

[13]Although rules limiting collateral attacks do not apply as rigidly to equitable decrees with prospective force, such decrees are nonetheless entitled to respect as "final judgment[s]," *Rufo*, 502 U.S. at 391, and, far from permitting issues to be raised *more readily* on collateral challenge, *Rufo* makes clear that they "may be reopened *only to the extent that equity requires*," *id.* (emphasis added).

narrower," *id.* Here, Respondents did not move to vacate; they raised objections – to provisions they agreed to – as a defense to enforcement. *Cf. id.* at 327 (although alleged error concerning need for an injunction would "ordinarily [be] remediable on appeal. Such an error is waived by the consent to the decree").

III. The Appeals Court's Limitations On Enforceable Decrees Are Unwarranted

Nor can the Fifth Circuit's decision be sustained on the ground that the underlying decree was not "lawful," *Anderson*, 18 U.S. at 227, in the sense that its provisions exceeded a federal court's power to impose. As noted above, the appeals court's decision did not question that the decree provisions in this case (1) "served to resolve a dispute within the court's subject matter jurisdiction," (2) "came within the general scope of the case made by the pleadings," and (3) "furthered the objectives of the law upon which the complaint was based." *See Firefighters*, 478 U.S. at 525.

Rather, the court indicated that where State officials are defendants, a consent decree provision may be enforced only if two *additional* requirements are satisfied: (1) the obligation violated would be a requirement of federal *law* (absent the decree), and (2) the violation would be actionable under § 1983 as a deprivation of "federal *right*."

Although the Fifth Circuit linked these two requirements to the "jurisdictional" nature of the Eleventh Amendment (and the *Ex Parte Young* exception), limits it said apply "[r]egardless of what the parties agreed to in the consent decree," neither accurately describes a limitation on a court's power to enter a decree, let alone a valid basis for disallowing enforcement of provision against a party who urged its adoption.

A. State Officials May Undertake – And Federal Courts, Enforce – Obligations That Go Beyond Compliance With Federal Law

As an example of the first restriction, the decision below held that a decree provision requiring that defendants "'*effectively*' inform the class about EPSDT services," 300 F.3d at 546 (emphasis added), was unenforceable because the federal statute, 42 U.S.C. § 1396a(a)(43)(A), mandates "'informing all [eligible persons] of the availability of [EPSDT] services," – but *"does not expressly require 'effective' conveyance of information."* 300 F.3d at 546 (emphasis added).

This ruling reflects a misunderstanding of federal courts' equitable power. Even when State officials do not consent, courts may enjoin conduct that is not in itself unlawful. In such cases, a court order must "be related to," *Milliken v. Bradley*, 418 U.S. 717, 738 (1974), the federal law it enforces – as this decree provision undeniably is – but it need not be limited to "a directive to obey the [statute]," *Rufo*, 502 U.S. at 389. *See also FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 698 (1978); *Swift*, 276 U.S. at 330.

And this Court's decision in *Rufo* – a case involving a consent decree to which a State official was a party, *see* 502 U.S. at 372 – establishes that federal court may enter a consent decree obliging an official to "not only do more than the Constitution itself requires * * * [but also] *more than what a court would have ordered absent the settlement.*" *Id.* at 389 (emphasis added). *See also Suter*, 503 U.S. at 354 n.6 (citing *Rufo*'s recognition that parties "may agree to provisions in a consent decree which exceed the requirements of federal law").

Informed by this understanding, *Rufo* announced principles to guide courts' response to post-decree developments that establish the lawfulness of conduct that a decree prohibits. *See* Fed. R. Civ. P. 60(b)(5). While a significant change may warrant modification of the decree, *Rufo* stressed, "[a] proposed modification should *not* strive to rewrite a consent decree *so*

that it conforms to the constitutional floor," 502 U.S. at 391 (emphasis added).[14]

Under the Fifth Circuit rule, the "constitutional [and statutory] floor" defines the outer limit of a *court's power* – even when State officials have not sought a modification, let alone carried their burden of showing that equity requires one.

B. The Fifth Circuit's Further Restriction, To Obligations To Which Plaintiffs Have a § 1983 Right, Is Wholly Unwarranted

The error of *further* limiting federal court decrees to those obligations to which a plaintiff is independently entitled as a matter of "federal right" *i.e,* that "would be remediable" under § 1983 " in the absence of the decree" is even more plain.

The only authority cited for that proposition, the Circuit's prior decision in *Lelsz*, does not support it. Although that decision used the phrase "federal right" as a limitation on the reach of a consent decree, it did so to emphasize the distinction between claims (and decree provisions) that had their *source* in *State*, rather than federal *law* – in the course of holding that only the latter were enforceable. *Lelsz* gave no indication that it was further incorporating the principle – significant in this Court's § 1983 jurisprudence – that violations of "federal law" are not necessarily deprivations of the personal "rights" for

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[14]In rejecting the government defendants' arguments for a less demanding modification standard, *Rufo* explained that such a rule "'would necessarily imply that the only *legally enforceable* obligation assumed by the state under [a] consent decree was that of ultimately achieving minimal constitutional * * * standards,'" 502 U.S. at 390 (quoting *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991) (emphasis in original)) – a proposition the decision treated as self-evidently erroneous.

Although *Rufo* involved a decree agreed to after a judicial finding of liability, *Lawyer v. United States Dep't of Justice*, 521 U.S. 567 (1997), makes plain that a consent decree's validity does not depend on a finding or admission of liability. *See also Maher v. Gagne*, 448 U.S. 122 (1980).

which § 1983 provides a cause of action.[15] *See, e.g., Golden State Transit*; *Dennis v. Higgins*, 498 U.S. 439 (1991).

This asserted, second limitation, like the first, cannot be squared with *Rufo*. To the extent that intervening judicial decisions had resolved that double-bunking was permissible under federal *law*, *see Bell v. Wolfish*, 441 U.S. 520 (1979), the detainee-plaintiffs in that case could not claim a *§ 1983 right* to single-selling. *See* 42 U.S.C. § 1983 (providing cause of action for "deprivation of any rights, privileges or immunities *secured by the Constitution and laws*") (emphasis added); *cf. Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (claimed violation of "clearly established" constitutional right is foreclosed when there is no "constitutional right at all").

And *Suter v. Artist M.* specifically explained that there was nothing inconsistent about a State official's entering into a consent decree (in a parallel proceeding) that obliged her to make "reasonable efforts" to maintain and reunify families, and her arguing – successfully – in this Court, that a statutory requirement to that effect, *see* 42 U.S.C. § 671(a)(15), was insufficiently definite to give rise to a § 1983 claim. Rather than requiring "'reasonable efforts,' with no further definition," *Suter* explained, *the decree* had included provisions "defin[ing] the standard against which those efforts are to be measured." 503 U.S. at 354 n.6.

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[15]The order sought to be enforced in *Lelsz* required State officials to comply with State law – and had been entered before this Court decided *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984). *Lelsz* noted that the situation would unlikely recur, because (1) officials would be aware that State-law based injunctions would be unavailable in litigated cases, 807 F.2d at 1254 and (2) courts, before entering future decrees, would assure themselves, as did the district court here, of their subject matter jurisdiction, *id.* at 1253 n.13. *Cf. Komyatti*, 96 F.3d at 961 (holding that no issue arises when State officials settle *federal* claims by promising to comply with State standards).

But even if these cases were not controlling, there is no principled basis for allowing an official whose conduct is violating federal *law* ***and*** a consent decree provision to defeat enforcement of that provision, on the ground that plaintiff could not establish a § 1983 "right" absent the decree.[16]

First, although the Fifth Circuit cited *Ex Parte Young* as supporting this further limitation, the "theory of *Young*" is that "remedies designed to end a continuing violation of *federal law* are necessary to vindicate the federal interest in assuring the supremacy of that law," *Green* 474 U.S. at 426 (emphasis added). Indeed, the opinion below elsewhere recognized that "[f]or purposes of the Supremacy Clause and *Ex Parte Young*, the mandates set out in Medicaid statute are * ** federal law," 300 F.3d at 550.

Consistently with these principles, this Court has repeatedly sustained judgments in cases compelling State officials' prospective compliance with federal law – without inquiring whether plaintiffs had a statutory cause of action (and under circumstances where precedent indicates that a § 1983 claim would not lie). *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000) (claim that state statute "unconstitutionally infringed the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by [a] federal Act"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-81 (1992) (claim that state

[16]To the extent that the appeals court's decision is understood to mean that a motion to enforce a court order requires a statutory cause of action, it suffers from the defect discussed *supra*: treating a proceeding seeking compliance with a judgment (in a case where the court has expressly retained jurisdiction) as if it were a new suit. As the precedents cited above make plain, a motion to enforce is, in substance, indistinguishable from an "[equitable] bill ancillary to an original case or proceeding," *Local Loan Co.*, 292 U.S. at 239. *See* Fed. R. Civ. P. 2; *see also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280 (D.C. Cir. 1993) (explaining that decree enforcement proceedings are governed by contract law principles).

regulation was preempted by federal statute); *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983); *see generally Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645-46 (2002) (noting Court's long record of entertaining "injunction suits against state regulatory commissioners").

Whether these cases establish that "the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws," *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990) (citation omitted), or that plaintiffs may "seek[] declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting), they at least confirm that the existence *vel non* of a § 1983 cause of action does not go to a court's power. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994); *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998); *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). *See generally Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting), (explaining that prospective relief is available without regard to whether plaintiff "can show *the deprivation of a right, privilege, or immunity secured by federal law*") (emphasis added).[17]

To the extent that the Fifth Circuit held that a district court is required to determine, before enforcing a decree, whether plaintiffs would have been able to establish a statutory entitlement to relief had the case been litigated to completion,

[17]*Cf. Antrican v. Odom*, 290 F.3d 178, 191(4th Cir. 2002) (declining to consider § 1983 issues raised on interlocutory appeal because they were "not 'inextricably intertwined' with North Carolina's Eleventh Amendment immunity claim, nor [was their consideration]'necessary to ensure meaningful review of the * * * immunity question.'") (citations omitted).

rather than settled, that is precisely the sort of question that precedent teaches should not be asked. *See Rufo*, 502 U.S. at 391-92 (a "court should not 'turn aside to inquire whether some of [the provisions of the decree] * * * could have been opposed with success if the defendants had offered opposition'") (quoting *Swift*, 286 U.S. at 116-17).

Indeed, while consent decrees, like other prospective equitable judgments, may be reopened "to the extent that equity requires," 502 U.S. at 391, they are otherwise "subject to the rules generally applicable to other * * * decrees," meaning that objections that do not go to a court's power to render judgment may not be raised as an excuse for noncompliance with an (unmodified) final judgment. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976) ("outstanding injunctive orders of courts [must] be obeyed until modified or reversed by a court having the authority to do so"). The Fifth Circuit rule, which treats the cause of action question as one that must be adjudicated in plaintiff's favor before a party bound by the judgment may be compelled to comply, respects none of these principles.[18]

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[18]It bears emphasis that the Fifth Circuit treated its rules as governing "[r]egardless of what the parties agreed to in the consent decree," 300 F.3d at 542. Thus, State officials are *without power* to waive the objection that a plaintiff does not have a § 1983 cause of action – even in a case where prospective compliance with federal law is all that is sought. That rule is facially incompatible with *Suter*, *see supra*, which recognized that an official could waive a valid § 1983 defense, and imposes a more stringent rule than *Clark v. Bernard*, which establishes that "sovereign immunity is 'a personal privilege which [a State] may waive at pleasure,'" 108 U.S. at 447.

Indeed, while the Court has treated Sovereign immunity defenses somewhat differently than other objections – allowing them to be raised for the first time on appeal, *see Edelman*, 415 U.S. at 678 – the costs of even that limited exception have been acknowledged, *see Schacht*, 524 U.S. at 395 (Kennedy, J., concurring); *Ku v. Tennessee*, 332 F.3d 431 (6th Cir. 2003), and there is no precedent for allowing an objection (such as a § 1983 defense) that does not sound in sovereign immunity, let alone subject matter

IV. The Fifth Circuit's Rules Would Seriously And Unnecessarily Undermine Important Public Interests

A. The Decision Makes Settlements With State Officials A Practical Impossibility

Palpable unfairness to parties to existing consent decrees and incompatibility with orderly judicial process, *see supra*, are not the only demerits of the rules announced below. It is hard to imagine a more potent "disincentive to settle institutional reform litigation," *Rufo*, 503 U.S. at 389, than the legal regime established in the Fifth Circuit's decision.

It is axiomatic that parties' willingness to enter agreements will be affected by courts' readiness to enforce them, *see* A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW 4 (1979); *United States v. ITT Continental Baking*, 420 U.S. 223, 235-37 (1975) (consent decrees have "attributes of both contracts and of judicial decrees"), and this Court has recognized that the reasons why "consent decrees have become widely used as devices to facilitate settlement," *Firefighters*, 478 U.S. at 523 n.13, relate primarily to enforcement advantages, *see id.* (cataloguing advantages of decrees, relative to contractual settlements).

But the rule announced by the Fifth Circuit is especially drastic. If federal courts, confronting violations of consent decree provisions, were limited to enjoining actions that would be unlawful "in the *absence* of a decree,"300 F.3d at 537, plaintiffs who negotiate decrees will essentially be "giv[ing] up *something* they might have won had they proceeded with the litigation," *United States v. Armour*, 402 U.S., 673, 681-82 (1971) (emphasis added) – in exchange for nothing.

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jurisdiction, *see Cook County*, to be raised as a defense to non-compliance. *Cf. Hutto*, 437 U.S. at 696 ("A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant'") (quoting *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 77 (1927)).

The disadvantages of this regime would not be borne exclusively by federal court *plaintiffs*. As *Armour* and *Rufo* acknowledge, settlements of cases like this one can equally "serve the interests of defendants," *Evans v Jeff D.*, 475 U.S. 717, 733 (1986) (quoting *Marek v Chesny*, 473 U.S. 1, 10 (1985).

As noted above, the Fifth Circuit decision can be read to impose limitations that apply "regardless of what the parties agree to" – meaning that *defendants* have little power to waive defenses or enter decrees. *Cf. Montgomery v. Maryland*, 266 F.3d 334, 337 (4th Cir. 2001) (respect for State sovereignty "is undermined when a federal court imposes on a state a legal argument that the state * * * affirmatively withdrew"), *cert. granted and judgment vacated on other grounds*, 535 U.S. 1075 (2002). But even if that implication could safely be ignored, there can be no doubt that, as a practical matter, a rule that offers plaintiffs no incentive to settle will operate to constrict the options available to State officials.

A regime that effectively requires adversary adjudication in every case limits defendants' ability to determine that particular cases are not worth the "time, expense, and inevitable risk of litigat[ing]," *Armour*, 402 U.S. at 681, and there are strong reason to expect that a "compromise" that is "carefully negotiated" by the parties, *id.*, will be more reflective of and sensitive to State policy priorities than would be an injunction imposed at the end of litigation.

Finally, the benefits of consensual resolution of disputes like this one extend beyond the parties before the court. Longstanding policies favor "[s]ettlements of matters in litigation, or in dispute, without recourse to litigation," *St. Louis Min. & Mill. Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898); *Marek*, 473 U.S. at 5; *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts"); *see also* Fed. R. Civ. P. 16(a)(5); Fed.

R. Civ. P. 16(c)(7); Fed. R. Civ. P. 68. Not only are judicial and litigation resources channeled toward disputes for which there is no mutually acceptable resolution, but State residents can expect that solutions arrived at cooperatively will "promise[] to *work*" more effectively and more quickly, *see Griffin v. Prince Edward County Sch. Bd.*, 377 U.S. 218, 234 (1964), than those reached after protracted or rancorous adversarial proceedings.[19]

B. The Fifth Circuit's Rules Are Not Necessary To Protect Any *Legitimate* State Interest

Although the decision below undeniably enabled Respondents to avoid unwanted obligations, it should be clear that no novel rules are needed to protect *legitimate* State interests. *Cf. Lapides*, 535 U.S. at 620 (noting that "State's actual preference * * * might * * * favor selective use of 'immunity' to achieve litigation advantages"). Rather, settled principles governing consent decree entry and enforcement afford officials ample protection against uninvited court intrusion and inequitable decrees.

Officials are "under no compulsion," *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring), to agree to settlements; to make them enforceable in federal court, *see Firefighters*, 478 U.S. at 523 ("the choice of an enforcement scheme – whether to rely on contractual remedies or to have an agreement entered as a consent decree – is itself made voluntarily by the parties"); *Kokkonen*, or to enter into them before disputed legal or factual

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[19] *See* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 899 ("A remedy designed to reform the workings of a large organization is most effective when the organization cooperates in carrying out the remedy, and the human beings who make up an institution are more apt to cooperate in carrying out a negotiated scheme than in complying with an order imposed from above by a court"); *see also Komyatti*, 96 F.3d at 961.

issues are determined. *Cf. Jeff D.*, 475 U.S. at 727 ("The options available to the District Court were essentially the same as those available to respondents: it could have accepted the proposed settlement; it could have rejected the proposal and postponed the trial to see if a different settlement could be achieved; or it could have decided to try the case"). Moreover, defendants may enter decrees that preserve the right to appeal, *Hudson v. Chicago Teachers Union*, 922 F.2d 1306 (7th Cir.1991); *United States v. $92,422.57*, 307 F.3d 137 (3rd Cir. 2002); *cf.* Fed. R. Crim P. 11(a)(2).

Finally, even after officials give their consent to a judgment, there is "no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen," *Railway Employees v. Wright*, 364 U.S. 642 (1961). And in considering modifications, *see Rufo*, 502 U.S. at 392 – and even in enforcing decrees against recalcitrant defendants, *Spallone*; *Hutto* – federal courts are obliged to show special respect for State prerogatives.

In view of the legal rules already in place, the effects of the Fifth Circuit rule are uniformly undesirable: relieving defendants of freely undertaken obligations that they *could not* show to be inequitable (and permitting them this relief, despite their having disobeyed a decree), depriving plaintiffs of bargained-for remedies, relegating courts to "hoping" for compliance with their decrees, and disabling parties – plaintiffs and officials alike – who might otherwise be able to resolve disputes consensually from being able to do so.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Descriptions of *Amici Curiae*

AARP is a nonpartisan, nonprofit membership organization for people 50 and over, with 35 million members, of which 45% are working. We provide information and resources and advocate on legislation, consumer and legal issues for our members and other citizens, including low-income Medicaid beneficiaries such as those represented by appellants. Some AARP members are themselves beneficiaries of Medicaid, and their interests are directly jeopardized by the Fifth Circuit's decision. Over the years AARP has supported legislative amendments to Medicaid and other government programs, based upon the belief that its members and other citizens have both enforceable rights and access to the courts to present their claims for redress of violations of those rights. AARP has also participated in numerous court cases supporting Medicaid beneficiaries whose claims are based on legal principles disregarded by the Fifth Circuit.

The American Association of People with Disabilities (AAPD) is a national non-profit membership organization of children and adults with disabilities, their family members, and their supporters. AAPD's mission is to promote political and economic empowerment of the more than 56 million Americans with disabilities. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act, and works to ensure effective enforcement and implementation of civil rights laws and other laws affecting individuals with disabilities.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with affiliates or chapters in every state, and approximately 400,000 members dedicated to preserving the principles of liber', and equality

embodied in the Constitution and this Nation's civil rights laws. Since its founding in 1920, the ACLU has maintained an active docket of federal court litigation as one means of achieving its civil liberties goals. Today, the ACLU and its affiliates are participants in literally scores of consent decrees around the country involving such disparate issues as education, foster care, police misconduct, voting rights, and prison conditions. The ability to enforce current and future consent decrees against state defendants is therefore a matter of substantial importance to the ACLU and its clients.

The Anti-Defamation League ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's critical mission to combat all types of prejudice, discriminatory treatment, and hate. ADL has supported the enactment by Congress and the vigorous enforcement by the Executive Branch of our country's principal federal civil rights laws, and has consistently made its voice heard in the courts as an advocate fighting to guarantee equal treatment of all persons. ADL has filed *amicus* briefs in this Court in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws, or defending government enactments designed to prevent or punish discrimination and hate. These include many of the Court's landmark cases in the area of civil rights and equal protection. In particular, ADL has supported Congress's broad authority under the Fourteenth Amendment enforcement power to remedy constitutional deprivations caused by States, and Congress's authority to abrogate state sovereign immunity in cases of clear civil rights violations.

The Judge David L. Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to

advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. The Center has successfully resolved much of its litigation through the use of consent decrees with state officials, and enforcement of these decrees has been pivotal to achieving compliance with legal mandates and improving the lives of individuals with mental disabilities. See, e.g. *Wyatt v. Sawyer* (M.D. Ala) (class action raising constitutional and statutory challenges to conditions, policies and practices in Alabama's mental health and mental retardation facilities); *R.C. v. Nachman*, (M.D. Ala.) (class action raising constitutional and statutory challenges to deficiencies in child welfare system in Alabama); *New York State Assn for Retarded Children, Inc. v. Carey* (E.D.N.Y.) (class action challenging conditions at Willowbrook Developmental Center).

Children's Rights is a national nonprofit organization whose mission is to achieve reform in this nation's child welfare systems on behalf of abused and neglected children. For over thirty years, starting as the Children's Rights Project of the American Civil Liberties Union, and since 1995 as an independent organization, Children's Rights has championed the legal rights of children involved with child welfare systems through research, education and class-action litigation to improve government performance and accountability, and ensure better outcomes for those children. Children's Rights most often achieves the reforms it seeks by entering into negotiated federal consent decrees with government officials and then seeking enforcement of those decrees as necessary. Children's Rights is currently monitoring compliance with five federal consent decrees requiring State reforms - *Jeanine B. v. McCallum* (E.D. Wis. 2002); *Brian A. v. Sundquist* (D. Tenn.

2001); *G.L. v. Stangler* (W.D. Mo. 2001); *Joseph A. v. Ingram* (D.N.M. 1998); *Juan F. v. Roland* (D. Conn. 1991) - and has three other federal suits in active litigation, one of which is in settlement negotiations with state officials in New Jersey, *Charlie and Nadine H. v. McGreevey* (D.N.J.).

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because many P&As are involved in the ongoing enforcement of consent decrees, which significantly impact the lives of hundreds of their clients.

The National Health Law Program (NHeLP) is a non-profit law firm that represents people who cannot afford the high cost of health care. This includes representing working poor people, people with disabilities, and children in actions to obtain access to needed health care services. As such, NHeLP works extensively with the Medicaid program. In just the last five years, NHeLP has represented Medicaid beneficiaries in a number of federal court cases, including in Maine (*Risinger v. Concannon*), Louisiana (*Chisholm v. Hood*), and West Virginia (*Benjamin H.v. Ohl*). In each of these actions, the plaintiffs' complaint asked the court to order injunctive relief requiring the state Medicaid officials to comply prospectively with specific

provisions of the Medicaid Act. Rather than engage in lengthy and costly litigation of the issues, the parties mutually agreed to enter into consent orders that set forth specific actions the state officials would take to bring the Medicaid program into compliance with the federal law. NHeLP has a significant interest in the case before the Court. The ruling in this case will affect the clients in these cases, and it will influence our future representation of individuals who are being harmed by ongoing state violations of federal laws.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that, for over thirty years, has used the power of law to define and defend women's rights. As part of its efforts to achieve gender equality, NOW Legal Defense has participated in a number of lawsuits against government officials alleging violations of federal law that were resolved through consent decrees. NOW Legal Defense has an interest in ensuring the enforceability of those decrees and in preserving its ability to resolve ongoing and future lawsuits against government officials consensually. In addition, a major goal of NOW Legal Defense is to ensure full compliance with federal civil rights laws, including by state government entities. In support of that goal, NOW Legal Defense has frequently appeared as counsel and as *amicus* before this Court. The Fifth Circuit's decision in this case, if allowed to stand, would seriously undermine that goal.